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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees Under Deed Dated February 1, 1921, and Recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, Commonly Known as the Cool Land Syndicate,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

No. 419

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit and

SUPPORTING BRIEF.

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Dated August 28, 1944.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under Deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at page 621, commonly known as the Cool Land Syndicate, respectfully show:

Your petitioners seek to review the opinion and decision of the United States Circuit Court of Appeals for the Seventh Circuit rendered and filed on June 2, 1944, and the order and judgment of said Court entered pursuant to said opinion and decision on June 2, 1944, wherein said Court dismissed an appeal from a judgment on a Declaration of Taking and from an order denying a motion to vacate such judgment and to dismiss a condemnation petition.

The opinion of the Circuit Court of Appeals is reported in 142 Fed. (2d) 781.

I.

JURISDICTION.

The opinion and decision of the Circuit Court of Appeals was filed on June 2, 1944. The order and judgment of the Circuit Court of Appeals, entered in conformity with said opinion and decision, dismissing the appeal from the judgment on the Declaration of Taking and from the order denying the motion to vacate such judgment and to dismiss the condemnation petition was entered on June 2, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Section 347 (a), and under Section 8 of the Act of Feb. 13, 1925, 43 Stat. 940, 28 U. S. C. A., Section 350.

II.

QUESTIONS PRESENTED.

The following questions are presented for consideration in connection with this petition for a writ of certiorari:

1. Was the judgment on the Declaration of Taking made and entered in the District Court on November 12, 1942, final and appealable within the meaning of Section 128 of the Judicial Code, as amended by the Act of February 13,

1925, 43 Stat. 936, and the Act of June 20, 1938, 52 Stat. 779, 28 U. S. C. A., Sec. 225 (a)?

2. Was the order denying the motion to vacate such judgment and to dismiss the condemnation petition, made and entered in the District Court on November 30, 1943, final and appealable within the meaning of Section 128 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, and the Act of June 20, 1938, 52 Stat. 779, 28 U. S. C. A., Sec. 225 (a)?

III.

STATUTES INVOLVED.

Section 128 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, and the Act of June 20, 1938, 52 Stat. 779, 28 U. S. C. A., Sec. 225 (a), reads in part as follows:

> "Sec. 225. (Judicial Code, Section 128, amended.) Appellate jurisdiction—
>
> "(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> "First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

The Declaration of Taking Act, approved February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. A., Sec. 258a-258e, reads in part as follows:

> "Sec. 258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure.
>
> "In any proceeding in any court of the United States outside of the District of Columbia which has

been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date

to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, sec. 1, 46 Stat. 1421.

"Sec. 258b. Same; taking in advance of final judgment; appeal or giving of bond as preventing or delaying vesting of title.

"No appeal in any cause under section 258 of this title nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States. Feb. 26, 1931, c. 307, sec. 2, 46 Stat. 1422.

* * * * * * *

"Sec. 258d. Same; taking in advance of final judgment; right as additional to existing rights, powers, and authority.

"The right to take possession and title in advance of final judgment in condemnation proceedings as provided by section 258a of this title shall be in addition

to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority. Feb. 26, 1931, c. 307, sec. 4, 46 Stat. 1422.

"Sec. 258e. Same; taking in advance of final judgment; demolition of buildings thereon; erection of public buildings or works; funds available for purpose; application of section 255.

"In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 255 of this title: Provided, That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein. Feb. 26, 1931, c. 307, sec. 5, 46 Stat. 1422."

IV.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The United States of America brought action in the District Court of the United States for the Southern District of Illinois, Southern Division, to condemn certain land situated in Madison County, Illinois. In the District Court the case was styled "United States of America, Petitioner, vs. 1,113 Acres of Land, more or less, Situate in Madison County, Illinois, and Commonwealth Steel Company, a Corporation, et al, Defendants."

The petition for condemnation was filed on March 31, 1942, under the Act of Congress approved August 18, 1890 (20 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518, 50 U. S. C., Section 171).

On November 12, 1942, Declaration of Taking No. 1, signed by the Secretary of War, was filed, and thereafter and on the same day the District Court entered judgment on said declaration, vesting title in the United States of America "upon the filing of the Declaration of Taking * * *."

Thereafter service by publication was had upon Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees, commonly known as the Cool Land Syndicate, the owners of a part of the land sought to be condemned. In due course they filed their Motion to Vacate Judgment and to Dismiss.

Afterwards, to-wit, on November 17, 1943, the United States of America, by leave, amended its Petition for Condemnation. On November 22, 1943, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at page 621, commonly known as the Cool Land Syndicate, filed their Amended Motion to Vacate Judgment and to Dismiss. Therein they moved the Court to vacate the judgment as to Tract No. 7 (the part of the land sought to be condemned which they owned) entered on November 12, 1942, and to dismiss the petition for condemnation as amended on November 17, 1943. Afterwards, to-wit, on November 30, 1943, the District Court made and entered an order and judgment denying said amended motion.

On December 9, 1943, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees, as aforesaid, filed in the District Court a Notice of Appeal, whereby notice was given that they thereby appealed to the United

States Circuit Court of Appeals for the Seventh Circuit from (a) the judgment on declaration of taking made and entered on November 12, 1942, and (b) the judgment and order made and entered on November 30, 1943, overruling and denying their amended motion to vacate judgment and to dismiss. On December 27, 1943, they filed in the District Court their Statement of Points on Appeal and their Designation of Portions of the Record and Proceedings to be included in the Record on Appeal—in the order mentioned.

In the United States Circuit Court of Appeals for the Seventh Circuit the cause was styled "The United States of America, Plaintiff-Appellee, vs. Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under Deed dated February 1, 1921, etc., Defendants-Appellants." After proceedings not material here, the Circuit Court of Appeals on April 14, 1944, took the cause under advisement following hearing and oral argument.

The opinion and decision of the Circuit Court of Appeals was rendered and filed in said court on June 2, 1944. The order and judgment of said court, entered in conformity with said opinion and decision, dismissing the appeal was entered on June 2, 1944.

The decision of the United States Circuit Court of Appeals was:

(a) That the judgment on the Declaration of Taking was not final and not appealable;

(b) That the order denying the motion to vacate the judgment on the Declaration of Taking and to dismiss the condemnation petition, as amended, was not final and not appealable.

V.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The decision of the United States Circuit Court of Appeals for the Seventh Circuit that the judgment on the Declaration of Taking was not final and not appealable is directly contrary to, and in conflict with, the decisions of other United States Circuit Courts of Appeals on the same matter, to-wit: The decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of City of Oakland v. United States, 124 F. 2d 959, decided January 14, 1942; the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of United States v. 243.22 Acres of Land, 129 F. 2d 678, decided June 26, 1942; the decision of the United States Circuit Court of Appeals for the First Circuit in the case of Puerto Rico Ry. Light & Power Co. v. United States, 131 F. 2d 491, decided November 27, 1942.

2. The decision of the United States Circuit Court of Appeals for the Seventh Circuit that the order denying the motion to vacate the judgment on the Declaration of Taking and to dismiss the condemnation petition, as amended, was not final and not appealable, is directly contrary to, and in conflict with, the decisions of other United States Circuit Courts of Appeals on the same matter, to wit: The decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of City of Oakland v. United States, 124 F. 2d 959, decided January 14, 1942; the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of United States v. 243.22 Acres of Land, 129 F. 2d 678, decided June 26, 1942; the decision of the United States Circuit Court of Appeals for the First Circuit in the case of Puerto Rico Ry. Light & Power Co. v. United States, 131 F. 2d 491, decided November 27, 1942.

3. In holding that the judgment on the Declaration of Taking was not final and not appealable, the United States Circuit Court of Appeals for the Seventh Circuit decided an important question of federal law which has not been, but should be, settled by this Court.

4. In holding that the order denying the motion to vacate the judgment on the Declaration of Taking and to dismiss the condemnation petition, as amended, was not final and not appealable, the United States Circuit Court of Appeals for the Seventh Circuit decided an important question of federal law which has not been, but should be, settled by this Court.

VI.

PRAYER FOR WRIT.

Wherefore, your petitioners, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at page 621, commonly known as the Cool Land Syndicate, respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, and commanding that Court to certify and send to this Court for its determination, on a date certain to be therein named, a full and complete transcript of the record and of all the proceedings in the Case numbered on its docket No. 8500, and entitled "The United States of America, Plaintiff-Appellee, v. Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, etc., Defendants-Appellants," and that

the order and judgment of said Circuit Court of Appeals be reversed and that your petitioners may have such other and further relief in the premises as to this Court may seem proper.

Respectfully submitted,

DANIEL K. CATLIN,
FREDERICK PITZMAN,
LEWIS M. RUMSEY, JR.,
As Trustees Under Deed Dated February 1, 1921, and Recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, Commonly Known as the Cool Land Syndicate,

By THOMAS S. McPHEETERS,
HENRY DAVIS,
Their Counsel,
1630 Boatmen's Bank Building,
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GEORGE D. BURROUGHS,
Bank of Edwardsville Building,
Edwardsville, Illinois,
Of Counsel.

BRIEF

In Support of Petition for a Writ of Certiorari.

I.

OPINION BELOW.

The opinion and decision of the Circuit Court of Appeals for the Seventh Circuit was filed on June 2, 1944, and is reported in 142 Fed. (2d) 781. The order and judgment of the Circuit Court of Appeals was entered in conformity with said opinion and decision on June 2, 1944, and is not officially reported.

II.

JURISDICTION.

A statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (p. 2) and, to avoid duplication, is not repeated.

III.

STATEMENT OF THE CASE.

A statement of the case has been given in the petition (pp. 6 to 8), and to avoid duplication, is not repeated.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The United States Circuit Court of Appeals for the Seventh Circuit erred in holding and deciding that the judgment on the Declaration of Taking was not final and not appealable.

2. The United States Circuit Court of Appeals for the Seventh Circuit erred in holding and deciding that the order denying the motion to vacate the judgment on the Declaration of Taking and to dismiss the condemnation petition, as amended, was not final and not appealable.

V.

ARGUMENT.

A. Recognition of Conflict in Decisions.

The United States Circuit Court of Appeals for the Seventh Circuit, in its opinion in the instant case, 142 Fed. (2d) 781, recognized a conflict in decisions on the matters here involved. It said (l. c. 783):

> "It is contended, however, that the judgment on the Declaration of Taking which vested title in the government is final, and that such judgment is an exception to the general rule as to finality in a condemnation proceeding. A number of courts have considered this question and appear to be in rather hopeless conflict. Appellants rely upon the decisions of three circuits as sustaining their position. City of Oakland v. United States, 9 Cir., 124 F. 2d 959; United States v. 243.22 Acres of Land, 2 Cir., 129 F. 2d 678, and Puerto Rico Ry., Light & Power Co. v. United States, 1 Cir. 131 F. 2d 491. The Oakland case carries little, if any, weight on the jurisdictional question, which it neither discusses nor decides. The 243.22 Acres of Land case in a measure sustains appellants' contention, although, the judgment there appealed from was a 'judgment of condemnation' [124 F. 2d 962], and the court expressly pointed out (footnote, page 683 of 129 F. 2d) that it made no decision as to whether a judgment based upon a Declaration of Taking was appealable. The Puerto Rico case squarely holds that a judgment on the Declaration of Taking is final and appealable.
>
> "Two courts have directly held to the contrary. Turnbull v. United States, 6 Cir., 139 F. 2d 126, and Dade County v. United States, decided by the Fifth Circuit April 22, 1944, 142 F. 2d 230. It is doubtful if a review of these conflicting decisions would be of material assistance, and we shall not attempt to do so. It is sufficient to observe that the weight of the authority found in such decisions is almost equally divided and, under such circumstances, we feel perfectly free to reach an independent conclusion."

B. Decisions of Other United States Circuit Courts of Appeals With Which the Decisions of the United States Circuit Court of Appeals for the Seventh Circuit in This Case Are in Conflict.

(a) City of Oakland v. United States.

The case of City of Oakland v. United States, 124 F. (2d) 959, decided by the United States Circuit Court of Appeals for the Ninth Circuit on January 14, 1942, involved an appeal from a judgment on a Declaration of Taking entered by the District Court of the United States for the Northern District of California, Southern Division, and from an order entered by the same court, denying a motion to vacate such judgment. The appeal was both from the judgment and from the order, each appeal serving the same purpose.

A proceeding by the United States to acquire by condemnation certain land on the Oakland waterfront for the military purposes of the United States as described in "An Act to authorize condemnation proceedings of lands for military purposes," 40 Stat. 241, as amended, 50 U. S. C. A., Sec. 171, and referred to in the Act of September 8, 1940, Public No. 781, 76 Cong. 3d Sess., appropriating money therefor, was instituted by filing a complaint in condemnation against the appellant and others on January 15, 1941. Simultaneously with the filing of the complaint there was filed in the name of the United States by the Secretary of War a Declaration of Taking conforming to the requirements of 40 U. S. C. A., Sec. 258a, and there was deposited in the registry of the court the estimated amount of just compensation for the property. Upon the filing of the Declaration of Taking and the making of the deposit, the Court entered a judgment, finding that the requirements of said statute had been complied with, and decreeing that in accordance with the terms and provisions of

the statute, title had vested in the United States; that the lands were deemed to have been condemned and taken for the use of the United States, and that the right to just compensation had vested in the persons entitled thereto, to "be ascertained and awarded in this proceeding and established by judgment herein pursuant to law." Summons was served upon the appellant January 16, 1941. On February 14, 1941, appellant filed a motion to vacate the judgment. This motion was denied on March 6, 1941.

One of the specifications of error addressed to the judgment was that the court erred in entering a judgment of condemnation on the declaration of taking, in the absence of any statutory authorization for any judgment thereon. The sole specification of error addressed to the order was that the court erred in denying the appellant's motion to vacate the judgment, to the end that the appellant might be given an opportunity to be heard at the trial upon any and all issues that may properly be raised in the proceeding.

The holding and decision of the United States Circuit Court of Appeals for the Ninth Circuit was expressed in these words (l. c. 963):

> "But appellant does challenge the power of the court to enter the judgment complained of, and insists that there is no authority therefor to be found in the law. The statute, however, declares that upon the performance of certain requirements the condemnation shall be effective. The judgment of the court here merely recites that it has found that these requirements have been met. The statute also provides that if the final award made exceeds the amount paid into court, interest shall be allowed on the amount of the excess from the date of the taking, and, further, the court is required to fix the time and the terms upon which defendant shall surrender possession, which all implies that the court must first express its judgment that the requirements of the statute have been com-

plied with. This is in accordance with orderly procedure. To advise the appellant of the action that has been taken certainly does not adversely affect the enforcement of its rights.

"The entry of an order by a District Court, without the benefit of express statutory authority, permitting the United States to take immediate possession to land sought to be condemned was upheld in Commercial Station Post Office v. United States, 8 Cir., 48 F. 183, and followed in Hessel v. A. Smith & Co., D. C., 15 F. Supp. 953, and United States v. Eighty Acres of Land, D. C., 26 F. Supp. 315."

The Circuit Court of Appeals affirmed the judgment of the District Court and the order of the District Court denying the motion to vacate the judgment.

In United States v. 243.22 Acres of Land, 129 F. 2d 678, the United States Circuit Court of Appeals for the Second Circuit said (l. c. 683):

"* * * Yet the court of appeals in the Oakland case passed on the merits. Its opinion does not mention the question of appellate jurisdiction, although our examination of the briefs shows that that question had been raised. Certiorari was denied May 14, 1942, 62 S. Ct. 1106, 86 L. Ed. . . ."

For denial of certiorari in the City of Oakland case, see 316 U. S. 679, 62 S. Ct. 1106, 86 L. Ed. 1753.

(b) United States v. 243.22 Acres of Land.

The case of United States v. 243.22 Acres of Land, 129 F. (2d) 678, decided by the United States Circuit Court of Appeals for the Second Circuit on June 26, 1942, involved an appeal from a judgment of condemnation entered by the District Court of the United States for the Eastern District of New York, and from certain orders of that Court not material here.

On December 17, 1940, the Secretary of War, in a letter to the Attorney General, requested the institution of pro-

ceedings to condemn appellant's land, stating that such acquisition was necessary for military purposes under the Act of July 2, 1940, 54 Stat. 712, 41 U. S. C. A. preceding section 1. The United States filed its petition in the court below to acquire the lands on December 19, 1940, attaching the Secretary's letter as an exhibit to the petition. At the same time, it filed a declaration of taking (signed by the Secretary), pursuant to the Act of February 26, 1931, 40 U. S. C. A., Sec. 258a, and deposited in court the estimated compensation. Judgment was entered the next day, December 20, 1940, declaring that fee simple title had vested in the United States and that the right to just compensation had vested in the persons entitled thereto, and directing immediate delivery of possession to the United States.

Appellant, by answer filed September 11, 1941, asked dismissal of the proceeding, alleging, among other things, that the proceeding was not authorized by law. An amended petition was then filed by the United States. Three days later appellant answered this petition, repeating the defenses contained in the original answer and alleging that the Court had no jurisdiction and that the petition did not state facts sufficient to constitute a cause of action.

Trial then ensued on the issues (other than compensation). On January 20, 1942, a judgment of condemnation was entered. Appellant appealed from this judgment and from the above mentioned orders.

The Circuit Court of Appeals for the Second Circuit said (l. c. 679):

> "A question is raised as to our jurisdiction to entertain the appeal from the judgment of condemnation entered, on January 20, 1942, after a trial upon issues other than that of compensation, but where compensation still remained to be determined. Our appellate jurisdiction is limited to 'final decisions,' with exceptions here irrelevant. 28 U. S. C. A., Sec. 225. The

judgment here, if it is not final, is not one of the kinds of interlocutory orders from which appeal is allowed under 28 U. S. C. A., Sec. 227."

The Court later said (l. c. 681):

"* * * In Forgay v. Conrad, 6 How. 201, 204, 12 L. Ed. 404, a decree set aside certain deeds as fraudulent and void; it ordered that certain lands and slaves should be delivered to the complainant, that one of the defendants should pay a certain sum of money to the complainant and that the complainant should have execution for these matters; it also provided that a master should take an account of the profits of the lands and slaves and of certain monies and notes. The court held that this decree was appealable. * * * The same ruling was made in Thomson v. Dean, 7 Wall. 342, 345, 19 L. Ed. 94. * * *"

The Court then cited several condemnation suits in which appellate jurisdiction was denied where damages remained to be assessed, and then embodied its holding and decision in this language (l. c. 282):

"However, in those cases, under the applicable statutes, there could be and there was no judgment as to title and possession until after the damages had been determined. Here the appeal is from a judgment of condemnation which, under the applicable statutory provisions, determined, after a trial, that the United States had title and was entitled to possession so that, if the appeal is postponed until after damages are assessed, the United States may, in the interval, enter upon the land and erect structures thereon or otherwise so act as to change the status substantially. The judgment of January 20, 1942, is, therefore, similar to the orders held appealable in Forgay v. Conrad, supra, and Thomson v. Dean, supra."

The Court affirmed the judgment.

Certiorari was denied in Lambert, Executrix, v. United States, 317 U. S. 698, 63 S. Ct. 441, 87 L. Ed. 558.

(c) Puerto Rico Ry. Light & Power Co. v. United States.

The case of Puerto Rico Ry. Light & Power Co. v. United States, 131 F. (2d) 491, decided by the United States Circuit Court of Appeals for the First Circuit on November 27, 1942, involved an appeal from a judgment of the District Court of the United States for Puerto Rico, decreeing title of properties of the defendant to be vested in the United States and authorizing the United States to enter upon and take possession of the premises.

The original petition for condemnation was filed on June 29, 1942, by the United States Attorney at the direction of the Attorney General, pursuant to the request of the Federal Works Administrator under the provisions of the amended Lanham Act, 55 Stat. 361. Accompanying the petition were a Declaration of Taking, a Motion for Judgment on Declaration of Taking, and an Order to Surrender Possession, and a deposit by the United States of the estimated amount of compensation due—all in accordance with the condemnation procedure authorized by the Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., Secs. 258a-258e. On the same day that the petition was filed, the District Court entered an ex parte judgment vesting title in the United States and ordering immediate surrender of possession. This judgment was vacated upon motion by defendant. The United States filed an amended petition for condemnation and renewed its motion for judgment on the Declaration of Taking. Defendant demurred to the amended petition, asserting its insufficiency on various legal grounds. After hearing and argument, the Court rejected the contentions of the defendant, and on July 10, 1942, entered the judgment appealed from.

The Circuit Court of Appeals for the First Circuit said (l. c. 494):

"At the outset the United States challenges our jurisdiction to entertain the appeal, on the ground

that the judgment is not a 'final decision' within the meaning of § 128 of the Judicial Code, 28 U. S. C. A., § 225. It is said that the judgment merely determined the Government's right to condemn, leaving damages for the taking yet to be assessed, and that it is therefore not a final and appealable judgment. This contention has been squarely rejected by the Second Circuit in a careful opinion reviewing all the authorities. United States v. 243.22 Acres of Land, 2 Cir., 1942, 129 F. 2d 678. We agree with this decision. See also City of Oakland v. United States, 9 Cir., 1942, 124 F. 2d 959, certiorari denied, 1942, 316 U. S. 679. * * * We said in Hubert Hermanos, Inc., v. People of Puerto Rico, 1 Cir., 1941, 118 F. 2d 752, 757: 'A "final decision" is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination.' Under the earlier act of August 1, 1888, 25 Stat. 357, 40 U. S. C. A. §§ 257, 258, establishing the procedure for the judicial condemnation of land, there could be no judgment affecting title or possession until after the damages had been determined. It was the particular purpose of the Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A. §§ 258a-258e, to sever the taking of title and possession from controveries as to valuation, and to provide a procedure whereby the United States might be speedily and conclusively vested with title and possession, with authority to demolish existing structures on the condemned land, leaving the issue as to the amount of compensation to be determined in subsequent proceedings. The judgment on the declaration of taking, having this final and immediate effect on property rights, obviously should be reviewable at once, without the necessity of awaiting the outcome of long drawn out controversies as to valuation. Therefore, on reason as well as on authority,

we hold that the judgment in question is a 'final decision' within the meaning of § 128 of the Judicial Code."

The Circuit Court of Appeals vacated the judgment of the District Court and remanded the case to that court.

C. Decision of Another United States Circuit Court of Appeals With Which the Decisions of the United States Circuit Court of Appeals for the Seventh Circuit in This Case Are in Accord.

(a) Dade County, Fla. v. United States.

The case of Dade County, Fla., v. United States, 142 F. 2d 230, decided by the United States Circuit Court of Appeals for the Fifth Circuit on April 22, 1944, involved an appeal from an order of the District Court of the United States for the Southern District of Florida, amending a prior order on a declaration of taking.

On February 12, 1943, a proceeding was filed in the District Court of the United States for the Southern District of Florida, for condemnation under stated Acts of Congress, including the Second War Powers Act of March 27, 1942, 50 U. S. C. A., Appendix, Sec. 632, of a tract of land in Dade County, Florida, determined by the Secretary of War to be necessary for a supply and repair depot in connection with a Government airport. On February 15, the District Court made an ex parte order for immediate possession "subject to existing easements for public roads and highways." On March 24 the United States amended the petition by striking out the words subject to public roads and highways, and on the same day the court granted a new order for possession which conformed to the amendment. On April 14, Dade County entered an objection to the taking of two named highways in fee simple on certain stated grounds. A motion was also filed on the same

grounds to modify the last order for possession. On May 24 and July 23 orders were taken apparently ex parte, and based on declaration of taking and the deposit in the registry of the court of the estimated just compensation of two parcels of the land, which order declared that the United States was vested with the title in fee simple to the lands described. On August 16 the United States sought to amend the first declaration of taking so as to include the roads and highways. On that date the judge of the District Court heard the objection and motion of Dade County and overruled them, and by a separate order of the same date amended the order on the declaration of taking as moved by the United States. The appeal was from the order of August 16, 1943.

The Circuit Court of Appeals for the Fifth Circuit said (l. c. 231):

> "We are of opinion that the refusal to modify the order touching possession, and the amendment of the order touching the vesting of title are not final judgments substantially disposing of the case and leaving merely a distribution of a fund to be accomplished * * *."

And in its discussion of the "Declaration of Taking Act," the Court said (l. c. 231):

> "* * * The statute declares: 'Upon the filing of said declaration of taking and the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands * * * shall vest in the United States of America * * * and the right to just compensation for the same shall vest in the persons entitled thereto.' It does not matter whether the court makes any order about it or not. The Act proceeds to say, 'and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein.' That is the real and substan-

tial function of the court. That judgment is the essential and final one. What precedes is interlocutory. * * *

"Date County, we conclude, may not arrest the condemnation proceeding by an appeal at this time touching the possession or title to its roads. That may be examined after compensation has been fixed. * * *

"The appeal is premature and is dismissed."

Note: Turnbull v. United States, 139 F. (2d) 126, was decided by the United States Circuit Court of Appeals for the Sixth Circuit on November 29, 1943. In its opinion, in the instant case, 142 Fed. (2d) 781, the United States Circuit Court of Appeals for the Seventh Circuit cites (l. c. 783) Turnbull v. United States as holding contrary to the Puerto Rico case. The Turnbull case appears, however, to be not in point.

D. Important Questions of Federal Law.

In the instant case the United States Circuit Court of Appeals for the Seventh Circuit decided that (a) a judgment on a Declaration of Taking was not final and not appealable and (b) an order denying a motion to vacate a judgment on a Declaration of Taking and to dismiss a condemnation petition was not final and not appealable. In so doing, that Court decided questions of federal law which have not been settled by the Supreme Court of the United States, namely, (a) the appealability of a judgment on a Declaration of Taking and (b) the appealability of an order denying a motion to vacate such a judgment and to dismiss a condemnation petition. These questions are important, and should be settled by the Supreme Court of the United States, because (a) a large number of owners have been, are being, and probably will be, divested of

title to property under and by such judgments and (b) the value of properties which have been, are being, and probably will be, affected by such judgments is great.

Petitioners, therefore, respectfully submit that the Court, in the exercise of its supervisory power, should grant to the petitioners a writ of certiorari and thereafter review and reverse the order and judgment of the Circuit Court of Appeals.

Respectfully submitted,

DANIEL K. CATLIN,
FREDERICK PITZMAN,
LEWIS M. RUMSEY, JR.,
As Trustees Under Deed Dated February 1, 1921, and Recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, Commonly Known as the Cool Land Syndicate,

By THOMAS S. McPHEETERS,
HENRY DAVIS,
Their Counsel,
1630 Boatmen's Bank Building,
St. Louis, Missouri.

GEORGE D. BURROUGHS,
Bank of Edwardsville Building,
Edwardsville, Illinois,
Of Counsel.